EXHIBIT 52

Memorandum of Walker River Irrigation District
and Other Defendants in Answer to Brief on Exceptions
to the Master's Findings filed April 22, 1936

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Filed April 27th, 1936
P. O'Brien, Clerk
By A. Mellott, Deputy

IN EQUITY C-125

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA, IN AND FOR THE DISTRICT OF NEVADA.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
WALKER RIVER IRRIGATION DISTRICT, a corporation, et al,
Defendants.

MEMORANDUM OF WALKER RIVER IRRIGATION DISTRICT AND OTHER DEFENDANTS IN ANSWER TO "BRIEF ON EXCEPTIONS TO THE MASTER'S FINDINGS, CONCLUSIONS AND PROPOSED DECREE" FILED BY PLAINTIFF THROUGH ITS ATTORNEYS, ETHELBERT WARD AND WILLIAM S. BOYLE.

Pursuant to the authority conferred upon him in his appointment, the Master in the above-entitled case filed his report, proposed findings of fact, conclusions of law and decree on December 30, 1932.

The plaintiff, United States of America, and several defendants filed exceptions to the Master's report, proposed findings of fact, conclusions of law and proposed decree, within the time fixed by Equity Rule 66, which reads as follows:

> "The master, as soon as his report is ready, shall return the same into the clerk's office and the day of the return shall be entered by the clerk in the Equity Docket. The parties shall have twenty days from the time of the filing of the report to file exceptions thereto, and if no exceptions are within that period filed by either party, the report shall stand confirmed. If exceptions are filed, they shall stand for hearing before the court, if then in session, or, if not, at the next sitting held thereafter, by adjournment or otherwise."

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Exceptions were filed by the plaintiff, United States of America, within the time allowed by the foregoing rule and thereafter the plaintiff duly filed its brief in support of said exceptions by and through its attorneys, Ethelbert Ward and Cole L. Harwood. Thereafter, an oral argument was had at Carson City, covering the exceptions of the plaintiff as well as the exceptions of all defendants and the matter was duly submitted to the court for decision. After considering, the court rendered its decision and opinion on June 6, 1935, and filed the same with the clerk of the above-entitled court on June 7, 1935. All of the exceptions filed by the plaintiff as well as the exceptions filed by all of the defendants were disposed of and ruled upon by the court. In the opinion and decision the court entered an order, referring the matter back to the Master to take evidence and hear counsel for the purpose of determining what rights, their quantity and priority, if any, the Sierra Pacific Power Company is entitled to have decreed to it. The order of the court, which appears on the last two pages of the opinion and decision, reads as follows:

> "It follows from what has been said that the Sierra Company has not a riparian use for the impounding or storage of water for power purposes, and its prayer for judgment and decree confirming such rights must be denied. Doubtless appreciating the difficulties of the situation counsel for the Sierra Company, in oral argument, stated that he recognized that the proposed diversion and storage 'must be a reasonable one which must not interfere with the use of a lower appropriator.' But we are not here concerned with what has been described as 'the use of the hydraulic effect of the stream for the generation of electric current,' which has been held to be a legitimate exercise of the riparian right. Mentone etc. v. Redlands, 155 Cal. 525; Seneca C. C. M. Co. v. Great Western Power Co., 209 Cal. 206, 215. The Sierra Company is demanding confirmation of its claimed rights as a riparian owner to divert and impound water for power purposes, which is inhibited by law. All of the water in the rivers having been heretofore appropriated and put to beneficial uses, whatever rights to the waters of the West Walker, whether as riparian or appropriator, said company may now have or hereafter assert, it is clear that such rights are subject and subordinate

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to the prior rights of the lower appropriators, who are entitled to protection against interference, obstruction and diminution of the natural seasonal stream flow.

"Mention has been made herein of 350 or 400 acres of land, owned by the Sierra Company, which it is said has been irrigated since 1901, and of which there has been no determination as to priority or quantity. The case will be referred to the Master to take evidence and hear counsel for the purpose of determining what rights, their quantity and priority, if any, said company has in the premises. Said company may have thirty days from date hereof, if so advised in which to offer the necessary proofs. At the conclusion of the hearing the Master is directed to prepare and submit to this Court forms of findings of fact and conclusions of law and decree giving effect to this decision. Counsel for respective parties shall have ten days after notice to them by the Master of the filing of his report and said forms with the clerk, in which to submit their objections.

"Except as indicated by the views herein expressed, the exceptions to the Master's proposed findings and conclusions of law and decree, heretofore submitted, will be overruled."

It would appear from the foregoing opinion and order of the court that it was not intended to have the entire case re-opened and re-argued as counsel for the plaintiff, United States of America, has attempted to do by filing exceptions to the Master's report and again briefing the whole case after the time for filing exceptions has expired and after the court has fully considered the whole case and referred it again to the Master for the sole purpose of taking testimony on the rights, if any, of the Sierra Pacific Power Company. It seems clear that the court intended only that the parties should have ten days after the Master had rendered his supplemental report within which to object to such findings as had not been established by the decision and opinion because the court states:

> "Counsel for respective parties shall have ten days after notice to them by the Master of the filing of his report and said forms with the Clerk in which to submit his objections."
>
> "Except as indicated by the views herein expressed, the exceptions to the Master's proposed findings, conclusions of law and decree heretofore submitted, will be overruled."

Notwithstanding what is the obvious intent of the court to permit objections to be filed against any award made to the Sierra Pacific Power Company by the Master after taking testimony as directed by the court, the plaintiff, United States of America, has filed objections and exceptions which are in effect a duplication and reiteration of the exceptions and objections filed against the Master's original proposed findings, decree and report.

All of the cases cited in the brief filed November 1, 1935, by the United States have been referred to in the original brief and argument filed by the plaintiff. The same points have been argued in slightly different verbage and, however much we would desire to incorporate in a brief at this time a complete restatement of the views expressed in our former brief, we feel that it would only be a burden upon the court to be asked to again read such a brief. We feel that what has been stated in the brief filed by us on August 25, 1933, has been fully considered by the court and that it constitutes a complete answer to the argument advanced in the briefs filed by the United States. We therefore feel that we should not file an extended brief at this time but should merely refer the court to the original briefs in the case and the transcript of the oral argument had at Carson City in the year 1933.

The case of Winters vs. United States, 207 U. S. 564, is the only Supreme Court decision which the United States cites that bears upon the subject of a reservation of waters by implication. Indeed, the plaintiff states that it is the only United States Supreme Court decision upon the subject. The Winters case has been worn threadbare in support of the argument of the United States that it applies to a case of this character. However, we pointed out in the defendants' brief filed August 25, 1933, on

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pages 15, et seq., that the Winters case was readily distinguishable from the case at bar. We quoted from the decision written by Mr. Justice McKenna which, at the risk of being charged with unnecessary reiteration, we again quote:

> "The case, as we view it, turns on the agreement of May, 1888, resulting in the creation of Fort Belknap Reservation. In the construction of this agreement there are certain elements to be considered that are prominent and significant. The reservation was a part of a very much larger tract which the Indians had the right to occupy and use, and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the government, it was the desire of the Indians, to change these habits and to become a pastoral and civilized people. If they should become such, the original tract would be too extensive; but a smaller tract would be inadequate without a change of conditions. The lands were arid, and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the government. The lands ceded were, it is true, also arid; and some argument may be urged, and is urged, that with their cession there was the cession of the waters, without which they would be valueless, and 'civilized communities could not be established thereon.' And this, it is further contended, the Indians knew, and yet made no reservation of the water. We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession. x x x x x
>
> "By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it. On account of their relations to the government, it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the government, even if it could be supposed that they had the intelligence to foresee the 'double sense' which might some time be urged against them."

We submit that this court has by what was said on page 12, et seq., of the opinion of June 6, 1935, agreed with the defendants that the Winters case is readily distinguishable from the case at bar and we are content to rest upon what the court held after careful consideration of all of the facts and circum-

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stances to be the law of this case. The court has, with great labor and patience reviewed the evidence and it is apparent from the clear and explicit opinion that a thorough understanding and knowledge of the case in all its details was in the mind of the court when the opinion was written. For that reason, we are loath to burden the court with reiterations. We do desire, however, to answer that portion of the brief filed by the United States concerning the construction of a reservoir at the head of Walker Lake Indian Reservation.

On page 14 of the brief filed by the government on November 1, 1935, beginning with line 19, counsel for the United States say:

> "Congress had appropriated $10,000 in 1926 to investigate the feasibility of a reservoir."
>
> "The appropriation was made after this suit was filed. The recommendations of Engle have never been approved or acted upon. The reservoir recommended by Engle has never been built."

While there is no evidence in the record to support the foregoing statement, we assert that counsel for the government is in error with reference to the construction of a reservoir for the Indians for the reason that a reservoir actually has been constructed on the Indian Reservation above Schurz. Whether it is constructed at the precise point recommended by Engle, we are not prepared to say but the fact remains that an appropriation has been made to construct the reservoir and the impounding dam has actually been constructed and the water has been stored in the reservoir, which facts we assume will not be challenged by the plaintiff.

Technically speaking, the above quotation from plaintiff's brief to the effect that one of the reservoir sites recommended by Engle has not been utilized by the construction of a reservoir is correct, nevertheless the physical fact of the construction

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of the reservoir at a point a short distance lower on the stream cannot be disputed. Wherever the reservoir be situated seems immaterial so long as it is constructed and available for impounding water to irrigate the Indian lands.

We would not feel justified in making the foregoing assertion concerning the construction of the reservoir, except for the fact that the attorneys for the government have opened the door by making a denial in the brief that the Engle reservoir has been constructed.

Reference is made to the Weber site in the Blomgren Report in the letter of transmittal with summary and recommendations, which appears on page 89 of the so-called "Blomgren Report", offered in evidence and referred to in the opinion of the court. It is said:

> "The necessity for storage facilities in connection with the irrigation project of the Walker River Indian Reservation, in order to assure a safe and dependable all-season water supply for the lands, has long been recognized, and at various times for several years preceding the present investigations as funds and time have been available, the question has been the subject of considerable study, including extensive surveys and field investigations. These earlier investigations, however, failed in the discovery of a satisfactory storage site within or near the reservation, and moreover seemed to establish it as a fact that no such site existed other than the so-called Weber Site, which has so many objectionable features in addition to its inadequate capacity that it cannot be considered as feasible."

Apparently, subsequent investigations have proven the advisability of the construction of a dam at or near the Weber site because the dam and reservoir are now actually existing things.

A more complete description of the Weber Reservoir Site is contained on pages 45 and 46 of the Blomgren report, from which I quote:

> "The site of the dam proposed in the Begmer report known as the Weber Site, is located about nine miles above Schurz and two and one-half miles abovet the diversion dam for the present irrigated

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area of the project in the lower valley. This site has been thoroughly investigated and tested. The several dams proposed in the Beemer report were 40 feet in height above the river bed, elevation 4,180 feet, and the maximum storage of the reservoir with a water surface elevation of 4,212 , was 9600 acre feet."

On page 8 of the brief filed by the plaintiff, United States of America, on November 1, 1935, the following statement appears:

> "We cannot conceive of a civilized nation confining a lot of helpless starving savages on a sun-baked tract of desert lands without water, except for drinking purposes, unless it was the purpose of the United States that the Walker River Indian Reservation, in the language of Judge Talbot, should serve merely as a starvation camp and burying ground."

We answered such arguments in our former brief. In the winter of 1869, when it is claimed the reservation was created for the Indians, we pointed out in the evidence that the Indians were actually at war with the Whites and that for some two years or more later battles were had in which many White men were killed and scalped by the Indians. Notably is the battle in which General Ormsby, Captain Storey and many other Whites were killed near Pyramid Lake in an expedition against the Indians because of the murder of two White men at Williams Station. It is idle to argue that under such conditions the government contemplated the irrigation of 10,000 acres of land on the Walker River Indian Reservation for 600 savage Indians who were living upon game, fish and the roots of wild plants which abounded in the region at that time. The implication contended for that water for 10,000 acres of land was reserved from the Walker River under such circumstances as existed at that time is impossible, particularly in the light of subsequent developments whereby the Congress of the United States authorized, permitted and encouraged the settlement of homestead and desert lands and acquiesced in and declared through Congress that the waters of the non-navigable

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streams on the public domain were available for the development of such land. The implications raised by the acts of Congress beginning with 1866 down to the present time certainly do not argue in favor of the implication contended for by the government. The implication against the reservation of water when the tract of land was delimited in 1859 is certainly far more logical than the implication in its favor and in view of the fact that no treaty is under consideration, the conflict of implications cannot be followed as was followed in the Winters case, supra.

We have fully covered such argument in our brief of August 25, 1933, and respectfully request the court to re-examine the brief if the court is to give any consideration to a re-argument of mattere presented by the latest exceptions and briefs of the government.

Since the Supreme Court of the United States decided the case of California Oregon Power Company vs. Beaver Portland Cement Company et al, No. 612, reported in 79 Law Ed, 1356, 295 U. S. 142, many questions which had been in doubt with reference to the effect of the Act of 1866 and the Desert Land Act of 1877 have been set at rest. The defendants always contended for the interpretation of the Desert Land Act which was finally announced by the Supreme Court in the last mentioned case. Fortunately, the court had the benefit of this decision at the time the opinion in the case at bar was rendered and we respectfully submit that the conclusions of this court on the points in question were correctly decided. It is impossible to reconcile the decision of the Supreme Court of the United States in California Oregon Power Company vs. Beaver Portland Cement Company, supra, with the claim that the United States impliedly reserved water for the Indian Reservation. The serious consequences that would result from the actual taking of such water from the White settlers, who

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have beneficially used it and who have built up cities, towns and schools and developed the valley to its present state of cultivation, are beyond contemplation.

We therefore respectfully submit that the conclusions reached by the court in the opinion of June 6, 1935, are correct and should stand as against the United States of America.

Dated: January 8, 1936.

Very respectfully,

Attorney for Walker River Irrigation District and Certain Other Defendants.

Service of the foregoing Memorandum, by copy, is hereby admitted this 10th day of January, 1936.

Special Master.

Attorney for Plaintiff.

Attorneys for Defendant, Sierra Pacific Power Company.

Attorney for Certain Defendants.